EXHIBIT 6
DATE 1-25-13
HB HJ8

A legal review of S268 shows the following violations

of laws and our U.S. Constitution.

National Environmental Policy Act

National Forest Management Act

Multiple Use Sustained Yield Act

Endangered Species Act

Clean Water Act

Clean Air Act

Data Quality Act

Council on Environmental Quality regulations

Administrative Procedure Act

Federal Advisory Committee Act

Separation of Powers requirements of the U.S. Constitution

Fifth Amendment to the U.S Constitution

Tenth Amendment to the U.S. Constitution

LEGAL DEFECTS IN S268

The Bill surreptitiously alters the Coordination requirements of the Forest Management Act and the National Environmental Policy Act.

To the detriment of every county, city, and local district of government in Montana, this Bill provides the federal agencies with a means to evade and avoid the requirements in the Forest Management Act and the National Environmental Policy Act that the agencies "coordinate" with local government.

A. The National Forest Management Act.

The National Forest Management Act mandates that the Secretary of Agriculture "Shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, ***coordinated*** **with the land and resource management planning processes of State and local governments** and other Federal agencies."

To local governments this mandated coordination is critical. In 1982, the first rules issued by the Secretary of Agriculture after the statutory mandate was created, the Secretary directed Forest Service line officers to assure that forest service personnel "coordinate" federal planning efforts with local governments. 36 C.F.R. Section 219.7 provides:

> "The responsible line officer shall coordinate regional and
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> Forest planning with the equivalent and related planning efforts
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> Of other Federal agencies, State and local governments and the
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> Indian tribes."

The Secretary then defines what he means by "coordinate" by requiring the following actions:

1. give early notice of preparation of federal plan;
2. review plans and policies of local government, the review to include:
    a. consider objectives of local government
    b. assess interrelation of impacts between local and federal plans and policies
    c. determine how Forest should deal with the impacts
    d. consider alternatives for resolution of conflicts between local policies and federal
    e. meet with local government at beginning of planning to develop protocol for coordination
    f. seek input from locals to resolve conflicts
    g. monitoring and evaluation to consider impacts

This level of coordination is critical to local governments which are responsible for the economic stability of public health and safety of its constituents.

Senator Tester's Bill provides an escape mechanism for the Forest line officers by requiring in section 103(c) that as to stewardship and restoration projects, the Secretary shall coordinate with "applicable advisory committees or local collaborative groups". There is no mention in S 268 of the duty to coordinate with local government.

So, does this amount to a repeal of the National Forest Management Act's requirement of coordination? The answer to the question is debatable. It is a valid argument to say that under S 268 the Secretary does not have to coordinate with local government as to any " restoration projects" because S 268 specifically requires "collaboration and consultation" only with non-governmental committees.

Even those who would argue that S 268 does not strictly repeal the coordination requirements of the Forest Management Act, must admit that it provides "weasel room" for line officers to evade and avoid the coordination requirements.

The impact of this provision of S 268 strikes at the very heart of the protection to local government for which counties and special interest government districts have worked so hard for the past twenty years. Through coordination, local government has been able to hold the agencies at bay when trying to put down local ranchers and recreation users.

Whether intentionally, or accidentally, S 268 strikes a potentially deadly blow to every local government associated with the national forests subject to this Bill.

B. National Environmental Policy Act.

Senator Tester's S 268 has the same impact on NEPA which provides that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve **and coordinate** Federal plans, functions, programs, and resources..."

In bringing about this coordination, all federal agencies are directed to cooperate with local government. 42 USC Section 4331 (a) and (b).

S 268 either specifically amends NEPA as to "restoration projects" in the wilderness areas designated by the bill, or provides the evasive path for forest personnel to ignore and avoid the coordination requirements.

Intentionally and maliciously, or unintentionally and ineptly, the impact of S 268 is the same: the language of Section 103 (c) will undo years of progress made by local governments to get the Forest Service to the table on an equal discussion basis.

Senator Tester's Wilderness Bill, S. 268 Removes Management Discretion Given to the Secretary by the National Forest Management Act

The National Forest Management Act of 1976 and its predecessor acts endow the Secretary of Agriculture with a vast amount of discretion to plan for and administer the forests for the public good. The Act provides that the Secretary shall take into account the newest and highest quality information regarding management of the Forests. It also provides that he will take input and advice from local government, state government and all members of the public. There is no provision of the Act that provides for the Secretary to just arbitrarily apply a particular management technique to the exclusion of alternatives.

The provisions of the National Environmental Policy Act, of course, provide that the Secretary will seek public input under NEPA before adapting and applying a technique to the exclusion of others. In making his decisions, he must take into consideration all management acts relating to the forests, the Endangered Species Act, the Clean Water and Clean Air Act and the Data Quality Act.

But, S. 268 just arbitrarily dictates to the Secretary that he WILL apply each standard "described in the inland native fish strategy relating to the conservation and management of riparian habitat" to each restoration project. Section 104 (b) (1) (A & B). There is no exception. It is a mandate, no matter what the Secretary might find that would negate the usefulness of the standards.

Thus, the Senator, with limited input, in a bill written behind closed doors and with input from a very select group of special interests, has mandated the application of native fish strategy REGARDLESS OF THE CONDITIONS AND CIRCUMSTANCES PRESENT WHEN THE PROJECT IS PLANNED----AND REGARDLESS OF THE DETERMINATION OF BEST AVAILABLE SCIENCE---AND REGARDLESS OF PUBLIC INPUT.

This provision is not only contrary to the discretion granted by the National Forest Management Act, it violates the National Environmental Policy Act by evasion, and it violates the Separation of Powers requirements of the United States Constitution.

As to the latter point, Congress is indeed the manager of the federal lands including the forests. The Constitution so provides. But, Congress can delegate, and has delegated, to the executive branch the authority to manage the forests and other federal lands. That having been done, Congress has no authority, under the separation of powers, to meddle in the authority it has granted. Congress, no doubt, could reclaim the authority it delegated. But, it cannot have it both ways. It cannot delegate management authority, and then meddle by requiring the managers to apply an arbitrary rule that negates the general authority granted.

By requiring that the native fish strategy be applied, without question and without regard to the circumstances, Congress would also be taking away from local government access to management techniques through coordination.

C. Senator Tester's Wilderness Bill denies due process of law by allowing parties otherwise not having standing to become parties to appeals and litigation.

Section 103 (d) provides for the current court process for "Administrative Review" which is in place today. Anti access and management organizations will continue to litigate timber projects. All proposed stewardship contacts in S 268 will most likely continue to be challenged in court.

S 268 also bestows standing on committee and organization members who might have no standing at all. The Bill thus changes the process that is available to adversely effected persons through the Administrative Procedure Act and through the appellate rules of the Service.

Due process of law guarantees to all citizens the protection of statutory processes which have been established. Under the Administrative Procedure Act, and under Administrative rules issued by the Secretary, an appellant is entitled to a process uniquely styled to his/her facts, and open to only those who have been previously identified as having standing. This Bill provides standing to the world, regardless of the issue and regardless of adverse impact.

D. Senator Tester's Wilderness Bill severely limits the full impact of the National Environmental Policy Act.

The Bill grants exclusive input to the special interest groups who have helped the Senator to draft this Bill behind closed doors, without public meetings or public hearings, without input from or coordination with either the State or local government. This provision violates the provisions of NEPA, the process established by Council on Environmental Quality regulations, the coordination requirements of the Forest regulations and National Forest Management Act, and the requirements of the Federal Advisory Committee Act by allowing select special interest groups to exert undue influence on the agency.

Subsection 103 (c) (1,2 & 3) further compounds the violation by MANDATING that the Secretary "consult with advisory committees or local collaborative groups" before any

environmental analysis is conducted to reduce conflict and expedite project implementation. This provision also cuts out the entire rest of the public from any meaningful input to and on the environmental issues and concerns related to the project.

E. Senator Tester's Wilderness Bill violates the Fifth Amendment to the United States Constitution.

Section 204 (c), (d), (f), (i), (l) (m) violates the Fifth Amendment to the United States Constitution by restricting private property in such a way as to interfere with investment backed expectations. The measuring test established by Penn Central Transportation Company v. City of New York, provides that a taking can occur when an investment backed expectation of a property owner is taken or so severely restricted as to constitute a taking.

This Section places the use of private property totally in the discretion of a line officer of the Forest Service---one of the least qualified protectors of property interests in the world. It does not provide for exclusion of private property from wilderness designations, and it does not provide for payment for private property surrounded as an in holding by the wilderness designation. Rather, it provides that the Secretary shall provide "adequate access to the private property to ensure the reasonable use and enjoyment of the property by the owner."

The term "adequate" leaves it totally to the discretion of a line officer as to what type of access to permit. It provides no basis for the owner to have any input into the determination of "adequate" access; it provides no arbiter for determining whether the access allowed is truly "adequate"; it leaves it to a bureaucrat to determine adequacy, and to determine when to change any definition of access. It also leaves it to a line officer bureaucrat to determine what is "reasonable use and enjoyment" of the owner's property.

Specifically in Section 204 (L) (1), the Secretary or appointed line officer determines whether to allow existing water rights to be delivered to right holder. Line officer also determines whether existing water impoundment and storage structures will be allowed to remain in place or continue to be used by water right holder. No longer would a property owner have a valid Montana State water right but this right would be under the discretion of the line officer. The 1964 Wilderness Act clearly states there are no exemptions in the Act to exempt the Federal Government from State water laws.

1964 Wilderness Act

Sec 1133 use of wilderness areas (d)(6) State water laws exemption

"Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws".

Portions of Section 204 takes from the owner that element of control of his property which would assure protection of his investment backed expectation, and which would assure him any practical use of his property. The section is a move by Congress to "take" control of an owner's property, put it in the hands of a bureaucrat and make no compensation to the owner.

This Bill in no way is comparable to the method of designating wilderness in the Owyhee Public Lands Management Act passed in 2009. In that bill, no private land was included in wilderness except on a voluntary basis, with the owner agreeing to inclusion or, in the alternative, receiving compensation for his property.

The spirit, and letter of the Fifth Amendment is violated by the provisions of this section. It allows for a taking without compensation of any type. It allows for that taking without even allowing a basis for the owner to file a takings claim. The jurisdictional basis for establishing a taking will always be held in abeyance by the Forest Service's line officers through simple manipulation of access.

In providing a basis for depriving an owner of virtually all practical use of his property, without establishing the base line for a taking claim, the Bill deprives an owner of private property of due process of law. The owner can seek, and should seek, compensation pursuant to the Monterey Dunes Case in which the U.S. Supreme Court allowed a land owner to sue for damages in a jury trial.

This is a blatant attack on the property rights of owners of private property engulfed by wilderness decided on by select special interest groups working with the Senator behind closed doors, outside the public scrutiny.

F. Senator Tester's Wilderness Bill Evades the National Environmental Policy Act and the Coordination Requirements of the National Forest Management Act by Establishing Special Use Areas in Sections 205-210

The Bill establishes special protective areas and recreation areas in section 207 without any public input, meaningful or otherwise, in violation of the National Environmental Policy Act.

Only a very select group of forest users were allowed to participate in the drafting of this Bill. Neither the groups involved in the drafting, nor the Senator himself, will attend

public meetings to discuss the contents of the Bill and answer questions regarding its drafting and its purposes.

The policy which Congress itself established in the National Environmental Policy Act has been violated by this Bill. In NEPA, Congress declared it to be in the national interest to involve the public through meaningful participation in reviewing and analyzing proposals for land use projects. This Bill evades that policy completely by arbitrarily designating special interest areas, the boundaries thereof, and the rules for administration thereof.

Senator Tester, his staff, and his self appointed and designated drafting organizations have refused to meet with multiple use organizations, grazing organizations and all but a very limited representation of timber and logging interests to even discuss the contents of this Bill.

Public claims that this Bill is supported by and was drafted by a great cross section of users of the forest lands are simply not accurate. Local governments impacted by the special area designations have been ignored and kept outside the circle of drafters. Montana elected officials including commissioners, mayors, representatives and senators have been ignored and kept outside the circle of drafters. This is a special interest bill, designed to cater to and serve the whims of a very select group of organizations.

Not only is the lawful policy of the National Environmental Policy Act violated by the Bill, so is the statutory mandate that land use decisions affecting local government be coordinated with those units of local government. The counties and cities adversely impacted by the Bill's designations and land use restrictions have been ignored in the drafting of the Bill.

In short, this Bill represents a statement that Congress can ignore policy and law which it has created. This Bill puts Congress itself above the executive department and above the people of the United States by violating statutes that bind the public, that bind local governments, that bind private business.

G. Senator Tester's Wilderness Bill, S. 1470 violates the Tenth Amendment to the United States Constitution By Restricting Access of Public Safety and Health Emergency Services through Memoranda of Understanding

The tenth Amendment to the United States Constitution guarantees to local jurisdictions the authority to exercise the police powers related to public safety and health, without restriction by the federal government. There is no provision in the Constitution which

allows the federal government, Congress or otherwise, to restrict access of law enforcement authorities to carry out their duties to protect the public health and safety.

For Congress to assert an authority to restrict access by the terms of this wilderness bill is a clear violation of the Tenth Amendment.

The Congress oversteps its constitutional bounds by ignoring local authorities in making sweeping land use designations which may hamper provision of local police services to the citizens of a state. S 268 makes no mention or grants no authority to local governments to provide access for health and safety.

H. S 268 violates the 1964 Wilderness Act.

Sec. 1133. (d)(2) " Use of wilderness areas such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the United States Geological Survey and the United States Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress."

Congress clearly intended for all mineral resources to me inventoried and mapped prior to these lands inclusion into the wilderness preservation system. Senator tester has repeatedly refused to comply with this requirement under the 1964 Wilderness Act.

A Professor from the Butte School of Mines is quoted as saying "to lock away land in wilderness before identifying the location of mineral reserves present is like cutting off your nose despite your face."

The areas of the Beaverhead Deerlodge National Forest targeted by Senator Tester for wilderness designations are known to be the most mineral rich lands in the United States. Designation of wilderness which would remove availability of these resources from the citizens of the United States today and for future generations would pose a threat to our national security.